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No. 00-140

Supreme Court, U.S.
FILED
SEP - 5 2000
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In The

Supreme Court of the United States

UNIVERSAL BANCARD SYSTEMS, INC.,
a New York corporation,

Petitioner,

v.

BANKCARD AMERICA, INC., an Illinois corporation,
SAMUEL BUCHBINDER, and PAUL ALPERSTEIN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

At the first trial in this case, all parties agreed to give the jury an instruction on the Racketeer Influenced and Corrupt Organizations Act (RICO) which referred in its text to "Exhibit A," a list of "alleged racketeering acts . . . outlined as to each Counterdefendant." (App. 41) The RICO claimant tendered a proposed Exhibit A, listing 37 predicate acts alleged. The opposing parties made general objections to Exhibit A, the list of predicate acts alleged, but, prior to the return of the verdict, the opposing parties did not specifically identify for the trial court which of the 37 predicate acts listed were subject to their objections, nor did the opposing parties tender their own proposed Exhibit A. The questions presented are:

1. Whether general objections to a jury instruction, such as the general objections in this case, which do not specifically identify the portions of the jury instruction which are allegedly defective, and which do not inform the trial court how the jury instruction might be cured to the objector's satisfaction, are sufficient under Fed.R.Civ.P. 51.

2. Whether, in a civil action under RICO, general objections to a list of alleged predicate acts to be included in the jury instructions are sufficient under Fed.R.Civ.P. 51 where the general objections are not applicable to every predicate act alleged in the list, and the general objections do not specifically identify which predicate acts alleged in the list are allegedly defective.

3. Whether the general objections in this case to Exhibit A, the list of predicate acts alleged, were sufficient under Fed.R.Civ.P. 51.

RULE 29.6 LISTING

A complete Rule 29.6 listing is included in the Petition For A Writ Of Certiorari filed in this case.

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STATEMENT OF THE CASE

In the Petition For A Writ Of Certiorari filed on behalf of Universal Bancard Systems, Inc. ("Universal"), it is stated that the parties stipulated to the RICO jury instruction which was given (Document 90) (Petition For A Writ Of Certiorari, p. 5), although the list of 37 alleged predicate acts "was not part of the RICO jury instruction to which the parties had agreed" (Petition For A Writ Of Certiorari, p. 8).

In Respondents' Brief In Opposition, Buchbinder and Alperstein deny that there was, apart from the list of 37 alleged predicate acts, an agreed jury instruction on RICO (Respondents' Brief In Opposition, p. 26), and they deny that the parties agreed to the use of a RICO jury instruction which included in its text a reference to "Exhibit A" (Respondents' Brief In Opposition, p. 26, n. 2).

This difference is probably not a significant one because the Questions Presented relate to the sufficiency of Buchbinder's and Alperstein's objections to the list of 37 alleged predicate acts, and not to any purported objection to the related RICO jury instruction which referred to that list. In fact, in their post-trial motion, while Buchbinder and Alperstein objected to "Universal's instruction listing thirty-six [sic] alleged predicate acts as Exhibit A to the RICO instruction" (Document 99, p. 3), Buchbinder and Alperstein did not complain about the RICO instruction, itself.

This Court should be aware, however, that, in connection with the proceedings on Buchbinder's and Alperstein's post-trial motion, it appears that Buchbinder and Alperstein acknowledged that they had stipulated to

the RICO instruction. (Document 133, p. 5) In their reply memorandum in support of their post-trial motion, Buchbinder and Alperstein argued as follows:

> "As Counter-Defendants argued in their [post-trial] motion, Exhibit A to the RICO jury instruction contained three major prejudicial defects: many (1) of the predicate acts were not crimes, (2) the requisite intent to further the fraudulent scheme was not stated, and (3) several were not supported by any evidence. Once again, Universal's counsel incorrectly asserts that counsel for Counter-Defendants 'stipulated' to the instruction in an attempt to avoid the consequences of its actions. *While it is true that the attorneys did stipulate to the standard form RICO instruction,* counsel for Counter-Defendants did not stipulate to Exhibit A *to that instruction,* which is the list of predicate acts. Exhibit A was not a part of the form instruction *when the stipulation was signed.* When counsel for Universal first tendered the list of predicate acts on the morning of January 30th, Counter-Defendants objected to it on the record (Tr. 1203-04.)" (Emphasis added.)
>
> (Document 133, p. 5)

REASONS FOR GRANTING THE PETITION

In its Petition For A Writ Of Certiorari, Universal maintained that this Court should grant its petition because the United States Court of Appeals in this case sanctioned a departure by the district court "so far . . . from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's

supervisory power," and because the United States Court of Appeals in this case "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." (Rule 10 of the Supreme Court of the United States.) At issue was a decision that purported objections which Buchbinder and Alperstein made to Judge Duff to the list of 37 alleged predicate acts were sufficiently specific under Fed.R.Civ.P. 51. There were two objections which were held to be sufficient. One objection consisted of a question asked of Judge Duff by counsel for Buchbinder and Alperstein as to whether all of the alleged predicate acts on the list had been testified to, and the following question by that counsel to Judge Duff: "If they weren't [testified to], how can they be put in?" (Transcript, p. 1204) Judge Duff responded, "Well, then object to them. You haven't objected to any of them." (Transcript, p. 1204) Counsel for Buchbinder and Alperstein did not then, or at any time prior to the return of the verdict, identify to Judge Duff any specific predicate acts which they believed were not supported by the evidence. The Court of Appeals held that these questions were an "objection" which was sufficiently specific under Rule 51. The other objection which was held to be sufficient consisted of the following statement by counsel for Buchbinder and Alperstein:

> "We object because there is no indication of the level of intent to commit fraud that is necessary for these to be predicate acts under mail fraud and wire fraud statutes."
>
> (Transcript, p. 1203)

When Judge Duff pointed out to counsel for Buchbinder and Alperstein predicate acts on the list which did set forth the required mental state (Transcript, pp. 1203-1204), counsel for Buchbinder and Alperstein did not then, or at any time prior to the return of the verdict, identify to Judge Duff any specific predicate acts on the list which they believed did not adequately state the requisite "level of intent." The Court of Appeals held that this objection was sufficiently specific under Rule 51 even though Judge Duff had informed counsel for Buchbinder and Alperstein at least twice thereafter that he had not objected to any of the alleged predicate acts listed. (Transcript, pp. 1204, 1285) In the Petition For A Writ Of Certiorari, Universal maintained that the decision of the Court of Appeals would have required Judge Duff to usurp the role of an advocate, analyzing each of the 37 predicate acts alleged to determine which could arguably be considered subject to the general objections stated by Buchbinder and Alperstein. Universal maintained that review by this Court was warranted to maintain the proper balance in our adversary system of justice, and because the cited considerations from Rule 10 were implicated.

In response, Buchbinder and Alperstein do not dispute that they failed to identify to Judge Duff the specific alleged predicate acts which were, in their view, subject to their "objections." Buchbinder and Alperstein argue, however, that the cited considerations from Rule 10 of this Court are not applicable here. In support of their argument, Buchbinder and Alperstein cite a case for the proposition that Rule 51 requires only "that the objecting party make its position clear" (Respondents' Brief In

Opposition, p. 24), but they fail to explain how they made their position "clear" to Judge Duff without identifying for him the specific alleged predicate acts of which they were complaining. Buchbinder and Alperstein also state that they "were very specific about what portion or provisions of the RICO jury instruction they were objecting to" (Respondents' Brief In Opposition, p. 25), but they offer no explanation or analysis to support that bald conclusion.

Buchbinder and Alperstein also cite a case for the proposition that a party need not submit a new formal written instruction to make a sufficient objection under Rule 51. (Respondents' Brief In Opposition, p. 28) But Universal's position is not that Buchbinder and Alperstein were required to submit their own list of predicate acts, although that would have been sufficient; Universal's position is that Buchbinder and Alperstein were required to tell Judge Duff which of the alleged predicate acts were, in their view, improper.

Buchbinder and Alperstein also claim that they would not have had time to draft or redraft the list of alleged predicate acts (Respondents' Brief In Opposition, p. 27), but they do not claim that they asked Judge Duff for time to do so and he refused.

Finally, Buchbinder and Alperstein argue that they did not agree to the RICO jury instruction, *i.e.*, the portion of the instruction apart from the list of alleged predicate acts. Universal addressed the validity of this contention in the Statement Of The Case above. More importantly, however, even if the RICO jury instruction, apart from the list of alleged predicate acts, had not been

agreed to, that fact would not tend to establish the sufficiency of Buchbinder's and Alperstein's objections to Exhibit A, the list of predicate acts.

As stated in *Linn v. Andover Newton Theological School, Inc.*, 874 F.2d 1, 5 (1st Cir. 1989):

> "Trial judges are not mind readers. If there is a problem with the instructions, the judge must be told *precisely* what the problem is, and as importantly, what the attorney would consider a satisfactory cure." (Emphasis in original.)

CONCLUSION

For the reasons stated herein, the Petitioner, Universal Bancard Systems, Inc., respectfully requests this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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